IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

PLENTYOFFISH MEDIA, INC., Plaintiff, vs. ANH TRAN, Defendant.	CIVIL ACTION NO.: 1:09CV1152 TSE/TRJ **DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS**

DEFENDANT TRAN'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

COMES NOW Defendant ANH TRAN ("Tran"), by and through the undersigned counsel, and, pursuant to Local Rule 7 of the Local Rules of the Eastern District of Virginia, hereby submits the following Rebuttal Reply Memorandum in response to Plaintiff's Memorandum in Opposition to Defendant Tran's Motion to Dismiss.

I. Introduction

Tran moved to dismiss all six counts of Plaintiff's Complaint for failure to state claims for which relief can be granted. Plaintiff filed a responsive brief, to which Tran is now filing this Reply Memorandum. In its responsive brief, Plaintiff fails to sufficiently address Tran's arguments made in the Motion to Dismiss. Tran therefore repeats his argument that Plaintiff has failed to plead sufficient facts to support claims for which relief can be granted, and he thus respectfully requests that each count of Plaintiff's complaint be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

II. Argument

Plaintiff Has Failed to Plead Sufficient Facts to State Claims That Are Plausible On Their Face

In federal court, a claimant must make "a short and plain statement of the claim showing that the plaintiff is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court recently stated "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 13 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-1965 (2007)). The Supreme Court in *Iqbal* continued, "[a] pleading that offers 'labels and conclusions' or a 'formulistic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct. 1937, at 14 (internal citations omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (internal citations omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotation marks omitted).

The Supreme Court stated that there are "[t]wo working principles [that] underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 129 S. Ct. 1937 at 14 (internal quotation marks omitted). "Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. 1937 at 15 (internal citations omitted). "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not "show[n]" - "that the pleader is entitled to relief." *Id.* (citing Fed. R. Civ. P. 8(a)(2)).

The Supreme Court then adopts a two-prong approach to determine whether a complaint should be dismissed, stating, "[i]n keeping with these principals a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

In the instant case, in order to determine whether the Plaintiff's complaint is sufficient to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, we would look first to the Plaintiff's allegations to determine whether the allegations are mere conclusions and are therefore not entitled to the assumption of truth. Plaintiff's complaint is, for the most part, devoid of the requisite factual allegations necessary to pass the first prong, but rather full of mere legal conclusions. Among them, Plaintiff asserts:

a. “Defendant has in the past and currently maintains a Web site at freedatingfish.com that contains and displays Plaintiff’s federally registered trademarks.”

b. “Defendant registered a second domain name, freedatingfish.com and again placed a Web site at that location which included numerous copies of Defendant’s trademarks.”

c. “Defendant's Internet domain name, freedatingfish.com is confusingly similar to Plaintiff's trademarks and creates a likelihood of confusion.”

d. “Defendant's Internet domain name, freedatingfish.com is dilutive of Plaintiff's famous and distinctive trademarks.”

e. “…it is Defendant’s intention to create initial interest confusion and actual confusion among Internet users by: (1) registering a confusingly similar name to Plaintiff’s Web site, (2) hosting at that domain name a Web site which contains Plaintiff’s trademarks in it's meta data and in other places such that an Internet search engine such as Google or Yahoo would locate them, and (3) displaying Plaintiff’s trademarks on the face of the Web site, in order to create a false impression that Defendant’s Web site was in fact Plaintiff’s Web site or that Defendant’s Web site was somehow affiliated with Plaintiff’s Web site.”

Throughout this “factual basis of claims,” Plaintiff fails to specifically assert exactly how Tran's domain name and website allegedly contained Plaintiff's trademarks, which trademarks Tran allegedly infringed, where in the “meta data” and which “other places” Tran allegedly placed Plaintiff's marks, how Tran's domain name is “confusing similar” to any of Plaintiff's alleged marks, etc. Curiously, Plaintiff's responsive brief fails to identify any specific facts that lead the the conclusion that Tran utilizes or displays Plaintiff's trademark. Although Plaintiff claims that its “Complaint included a screen capture of Defendant Tran’s Web site as Exhibit 4 to the Verified Complaint which showed the use of Plaintiff’s mark by Defendant” and that "[c]ontrary to Defendant's assertions, the text referring to 'plentyoffish' or 'plenty of fish' on this site are not the result of Google ads, but rather are part of the permanent and intentional text of Defendant's Web site," Exhibit 4 of the Verified Complaint only shows a screen shot of the Website in which Plaintiff's alleged marks appear in Google advertisements, over which Tran has no control. Again, Tran's website at "freedatingfish.com" ("Website") does not purposely display the alleged mark "plentyoffish" anywhere in its content or its source code (meta data). See Exhibit 1 of Tran's Memorandum of Law in Support of Defendant Tran's Motion to Dismiss. Thus, the only instance in which the alleged mark 'plentyoffish' may have appeared on the Website was due to Plaintiff placing the mark there through the Google Adwords program, such mark being placed there without a request or specific action by Tran. To the contrary, it was Plaintiff who chose to participate in the Google Adwords program, and it is Plaintiff who may decide which websites are prohibited from displaying its marks via Google advertisements. Exhibit 4 of Plaintiff's Complaint does not show Plaintiff's alleged marks anywhere else on the Website, and Plaintiff offers no other facts or examples in its Complaint to support its claims of infringement.

Furthermore, although Plaintiff speciously claims that "plentyoffish.com" and "freedatingfish.com" are confusingly similar, Tran's "freedatingfish.com" domain is not identical to Plaintiff's alleged marks, nor is it confusingly similar to "plentyoffish," "plenty of fish," or "pof." In fact, the only word that Tran's domain and Plaintiff's marks have in common is "fish." Plaintiff has also failed to allege at least one specific instance where confusion over Tran's Website/domain name and Plaintiff's web site/domain name/alleged marks has occurred. Thus, the gravamen of Plaintiff's claim appears to be a claim to the use of the work "fish" for dating purposes. Said claim must fail as the word "fish" is clearly a generic term that is utilized for many purposes, from ocean creatures to dating. In the dating context, the term fish is utilized by many entities, including the operators of various Internet sites, as well as in the common vernacular in the phrase “there are plenty of fish in the sea”; thus, the terms “plenty of fish” and “fish” in the context of dating are generic. In essence, Plaintiff's complaint requests that this Court declare Plaintiff as the exclusive owner of the term “fish,” at least in the context of dating.

Therefore, rather than presenting concrete factual allegations, or specific instances of actual confusion, Plaintiff relies on mere conclusory language in fashioning its complaint and its responsive brief. Each count of Plaintiff's complaint makes threadbare recitals of elements of a cause of action, citing the statutes couched as facts and supported by that aforementioned conclusory language. Tran submits that Plaintiff's statements are no more than legal conclusions that are not entitled to the assumption of truth. Beyond one screen shot of the Website, Plaintiff offers no specific facts that lead to the conclusion that Tran utilizes or displays Plaintiff's trademark on his Website; even in the screen shot, Plaintiff's alleged trademarks are solely displayed in the Google advertisements which, as explained earlier, are controlled by Google and Plaintiff, not Tran. Perhaps Plaintiff's Complaint should have been filed against Google, Inc. Therefore, Plaintiff's complaint does not meet the first prong of the Supreme Court's test, as set forth above, and therefore fails to state causes of action upon which relief may be granted.

Plaintiff has stated that evidence outside of the original pleadings, such as the Tran affidavit, must be excluded by the Court; otherwise, the Court must treat the motion to dismiss under Fed. R. Civ. P. 12(b)(6) as a motion for summary judgment. However, even when evaluated as a Motion for Summary Judgment, Plaintiff's Complaint fails on its face, and dismissal is warranted. Plaintiff has not and cannot dispute the facts asserted in the affidavit, i.e., that Tran has not placed Plaintiff's mark on the Website. Given Plaintiff's impossibility to allege any facts supporting its theory of infringement, Plaintiff's only chance of prevailing is for the Court to rule that Plaintiff holds an exclusive right to the use of the word "fish" in the context of Internet dating. As explained in Tran's Motion to Dismiss, such a conclusion would not be grounded in common sense or trademark jurisprudence. Therefore, Plaintiff's complaint fails as described in the Motion to Dismiss and must be dismissed with prejudice.

WHEREFORE, in consideration of the foregoing, Defendant Anh Tran, by the undersigned counsel, respectfully repeats his request that this Court enter an Order dismissing Counts I, II, III, IV, V, and VI of Plaintiff's Complaint pursuant toFed. R. Civ. P. 12(b), and for such further relief as is appropriate.

Dated: December 23, 2009 Anh Tran

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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